United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL

75-2145

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA ex rel. :
AGNES SCRANTON, :
Petitioner-Appellant, :
-against- :
THE STATE OF NEW YORK, :
Respondent-Appellee. :

- X

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P/S

On appeal from the United States District Court for the Southern District of New York

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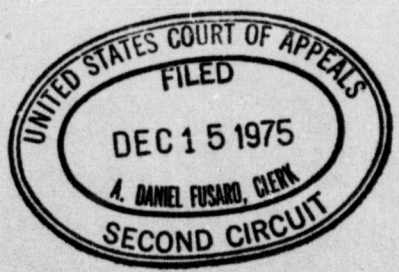
BRIEF AND APPENDIX FOR PETITIONER-APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA ex rel. AGNES SCRANTON,

Appellant,

-against-

THE STATE OF NEW YORK,

Appellee.

- X

BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from the denial by District Court Judge Richard Owen of a petition for habeas corpus requesting dismissal of a murder indictment for demonstrated and conceded failure of the State of New York to bring the petitioner to trial for a period of more than four years despite repeated written motions on the issue and requests for a speedy trial in the state court.

ISSUES PRESENTED

1) Whether federal habeas corpus is available to a state prisoner on the issue of a speedy trial prior to trial where it is conceded that there is no state or other remedy to reach the issue prior to trial and conviction when more than

four years have passed between indictment and the state's readiness for trial and where to proceed now with such belated trial would of itself constitute deprivation of the right to speedy trial.

2) Whether, under the facts of this case, "special circumstances" mandate either the issuance of the writ of habeas corpus for failure to afford petitioner her constitutional right to a speedy trial or a hearing to determine the merits of her claim of bad faith prosecution and other dilatory procedures which deprived her of her constitutional rights.

FACTS BELOW

Petitioner was indicted by a New York County Grand Jury on January 6, 1970, for murder of her fifteen-month-old daughter (A-70).[1] She was incarcerated from January 6, 1970, to some time in March 1970 when she was released on $10,000.00 bail. She is now and has been since March 6, 1975 when she was released from a three day period in jail, on parole. Between April 1972 to February 27, 1974 when the case reached the trial stage, present defense counsel brought on five successive written motions for dismissal of the indictment for

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1. References to the Appendix filed in proceedings in the New York State Court of Appeals and with the Court below will be made by reference to A- and page number. References to the Appendix attached to this brief will be made by AA- and page number.

failure of the state to provide the defendant with a speedy trial (A-97, 98; A-37; A-99, 105; A-110; A-60, 62; A-63, 65; A-20, 22). All the rulings were against the defendant. On January 3, 1973, however, Judge Martinis in the New York Supreme Court dismissed the motion to dismiss the indictment for denial of a speedy trial, but ordered the District Attorney to proceed expeditiously with the trial (A-113, 114). The state did not do so.

The District Attorney's office announced it was ready to try the case for the first time on January 21, 1974, more than a year after Judge Martinis' direction (A-21). When, on this occasion, the prosecution was faced once more with petitioner's request for a dismissal on the grounds of denial of a speedy trial, the Assistant District Attorney affirmed as follows:

> "1) The defendant has been on bail in this case virtually since its inception. The Assistant District Attorneys previously assigned to the case were engaged in trials of prison cases often at least as old, which obviously had to be disposed of prior to the trial of any bail cases such as this one.
>
> "2) Mrs. Scranton, the defendant in this case, suffers from sickle cell anemia, which is a generally fatal disease. The District Attorney's Office has been under the impression - always urged by the defendant, I am informed - that Mrs. Scranton would probably die at any time. This fact caused the District Attorney's Office to proceed without haste, having every reason to believe that Mrs. Scranton, because of her unfortunate and fatal disease, would never have to face trial. If in fact Mrs. Scranton was dying, there appeared to be no reason to force her to endure a trial for murder as well. Now, however, fortunately for Mrs. Scranton, we can only assume that her medical prognosis is better than we had been led to believe and we must proceed with the

trial of the instant case. . . . (A-23, 24)

"3) Any prejudice claimed by the defense because of the time elapsed since this indictment must be viewed as minor compared to the prejudice to the People upon whom rests the burden of proving defendant's guilt.

"WHEREFORE, the People respectfully submit that under all the circumstances, primarily the almost insurmountable backlog of prison cases and the People's consideration of defendant's medical condition, the motion to dismiss should be denied.

"Dated: January 24, 1974
New York, New York

LESLIE SNYDER" (A-25)

On such affirmation by the prosecution the motion for dismissal was denied and the case was called for trial in February 1974. The trial had barely got under way after the swearing of three jurors when, over petitioner's objection, a mistrial was declared on motion by the prosecution.[2]

Thereafter petitioner sought, by Article 78 proceeding through the Appellate Division of the New York Supreme Court, and appeal to the New York Court of Appeals, to obtain consideration of the speedy trial issue and a dismissal of the indictment prior to trial. Until the Court of Appeals decision in this very Scranton case, it had not been clear whether or not the

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2. Petitioner urged that this constituted jeopardy under appropriate law. This contention was rejected by the New York Court of Appeals, 36 N.Y.2d 704. Petitioner reasserted this position in her petition below but withdrew it on oral argument before Judge Owen as not constituting double jeopardy under applicable federal rules.

issue of denial of speedy trial w[illegible] available for review in New York by such special proceeding. The State Court of Appeals ruled that while double jeopardy may be raised by Article 78, speedy trial may not.

The case was set for trial in March 1975; petitioner thereupon brought this habeas corpus proceeding in the court below. Judge Owen heard argument and on March 17, 1975 enjoined the state court proceeding pending his decision (AA-14).

After considering the issue, Judge Owen dismissed the writ. He conceded that there was "some apparent support for petitioner's position", but on November 6, 1975, ruled against petitioner on the authority and reasoning of McDonald v. Faulkener, 378 F.Supp. 573 (E.D. Okla. 1974) (AA-34). Upon application of petitioner, Judge Owen extended the injunction against the state proceeding to trial pending decision of this Court.

Petitioner submitted for the consideration to the court below the appendix filed with the New York Court of Appeals and a supplemental affidavit to which was attached two affidavits of Harold Rothwax, Mrs. Scranton's first attorney, asserting that during the period he represented her (1970-1971) the state did not move the case to trial promptly because the Assistant District Attorney in charge of the prosecution did not deem the case a strong case -- that he did not remember to calendar it -- and was dilatory in bringing it to trial (AA-20-24). No controverting affidavits were filed by the state.

Also unrebutted in the court below were allegations in the moving papers filed by petitioner in affirmation form by her attorney brought on in 1972, 1973 and 1974, viz.:

April 12, 1972:

> "The dilatory attitude on the part of the People compels defendant herein to request the immediate production of all the relevant medical material in the possession of the District Attorney. Moreover, in view of the dilatory procedure of the prosecution in this case including the apparent loss of the file, defendant renews her motion for a dismissal of the prosecution in the interests of justice." (A-98)

May 3, 1972:

> "The delay in bringing Agnes Scranton to trial and the desultory fashion by which the prosecutor has responded to defendant's motions for discovery of the hospital records coupled with the court's delay in deciding the issue despite that delay in response, has effectively deprived the defendant of due process of law." (A-40)

October 10, 1972:

> "Moreover in this case which has been pending for over two years, the defendant has been denied her right to a speedy trial." (A-110)

Undated motion after October 10, 1972 (November 1973):

> "In May 1972, a motion to dismiss the indictment was made before this Court. On or about May 2, 1972 this Court denied the motion. Counsel renewed this motion on October 10, 1972. The motion to dismiss was again denied but this Court said:
>
> > 'The second branch of the motion regarding speedy trial is denied on the basis of the record. However the District Attorney is directed to expeditiously bring the case to trial.'

"Since October 1972, the case has been on the trial calendar on numerous occasions. Nonetheless the office of the District Attorney has not been ready for trial, nor has it moved the case for trial. It is now more than four years since the death of the decedent, nearly four years since the indictment, and Mrs. Scranton has not been tried. A trial at this time would violate Mrs. Scranton's constitutional right to a speedy trial." (A-61)

January 23, 1974:

"FIRST: I renew my motion to dismiss the indictment on all the grounds previously stated including what this Court (Martinis, J.) said on October 10, 1972, in response to a motion to dismiss for failure to bring defendant to trial:

> 'The second branch of the motion regarding a speedy trial is denied on the basis of the record. However the District Attorney is directed to expeditiously bring the case to trial.'

"The District Attorney announced ready for trial for the first time on January 21, 1974, more than four years after the defendant was indicted. If the defendant is found guilty of any crime, the conviction will be subject to reversal under the law reiterated recently by the Court of Appeals in People v. White 32 N.Y. 2d 393, 397 (1973)." (A-63, 64)

None of the factual statements set forth above were controverted by the state. In fact, Mrs. Snyder, for the state, conceded in her affirmation of January 23, 1974 that, because the prosecution had been under the impression that petitioner "would probably die at any time" the prosecution proceeded "without haste" -- hardly a legal or appropriate excuse for the four-year delay.

Despite these facts, uncontested in the record, the

court below found:

> "Petitioner's counsel has not advanced 'special circumstances' which would make it appropriate to adjudicate her a speedy trial claim prior to trial." (AA-31)

and again:

> "She [petitioner' makes an allegation of 'bad faith' on the part of the state but has not supported it with substantial evidence" (AA-32)

Prior to its adjudication, the court below submitted two questions to counsel:

> 1. "Is habeas corpus relief available in New York State to an individual at liberty awaiting trial on a claimed denial of his right to a speedy trial under the Sixth Amendment of the United States Constitution?
>
> 2. "Assuming petitioner has no presently available forum in New York State for review of her speedy trial claim and that the Court of Appeals denial of a writ of prohibition did not meet the merits of petitioner's claim, does this Court have jurisdiction to entertain a habeas corpus application of a non-incarcerated petitioner to dismiss a pending indictment immediately prior to the holding of a trial thereon in the state court on a speedy trial grounds?"

After these issues had been briefed by counsel the court found upon concession by the state that state habeas corpus was not available to the petitioner because she was not in custody. See People ex rel. Romano v. Warden, 28 N.Y.2d 928 (1971) (AA-29n). The court further found that, for federal habeas purposes, petitioner was sufficiently in custody (28 U.S.C. §2241) for federal habeas to be available. See Hensley v. Municipal Court, 411 U.S. 345 (1973) (AA-29). The court below further found that petitioner had exhausted her state remedies

prior to trial (AA-29) but held, nonetheless, that petitioner must submit herself to a state trial and if found guilty a state appeal before coming to federal court for collateral relief. The ruling below thus holds that defendant must surrender her right to a speedy trial and risk a shameful conviction in order to vindicate that essential right guaranteed to her by the Sixth Amendment.

ARGUMENT

I

FEDERAL HABEAS CORPUS REVIEW IS AVAILABLE TO A PETITIONER ON THE GROUNDS OF DENIAL OF A SPEEDY TRIAL PRIOR TO TRIAL WHERE PETITIONER HAS DEMONSTRATED THAT THERE IS NO AVAILABLE STATE REMEDY.

In the landmark case of Ex Parte Royall, 117 U.S. 241 (1886) the Supreme Court held that the federal courts retained the right of inquiry prior to trial into a detention claimed constitutionally illegal. However, said the Court:

> "We are of the opinion that while the Circuit Court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the Natural Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. . . the Circuit Court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstance requiring immediate action."

Somewhat later in time the Court in Peyton v. Rowe,

393 U.S. 54, 63, 66 (1969) has said:

> ". . . a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty . . ."
>
> ". . . Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily 'as law and justice' require."

The court below erroneously held in this case that "interests of comity demand that petitioner exhaust her state remedies" -- this even though the court below conceded that in the case at bar there was no state remedy which would reach the speedy trial issue prior to a trial itself.[3]

The court below further invoked the authority of Harris v. Younger, 401 U.S. 37 (1971) and its progeny citing language that "even irreparable injury is insufficient" to interfere with federal-state comity "unless it [the irreparable injury] is both great and immediate."

It is petitioner's view that Judge Owen has misapplied the teaching of Younger to the compelling requirement of relief in the case at bar and in so doing has underestimated the power of the Great Writ in the appropriate situation. Although not on

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3. Said the court below: "There is no question that petitioner here has exhausted her state remedies prior to trial" (AA-29n). The court further noted that petitioner had attempted to reach the issue by a three-step proceeding in the Supreme Court, the Appellate Division and finally the New York Court of Appeals where she raised the speedy trial issue but lost "on purely procedural grounds" (AA-29n).

all fours with the case at bar, Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) provides legal reasoning and a foundation for habeas relief in the instant case.

In Braden, a state prisoner incarcerated in Alabama applied to a federal court for a writ of habeas corpus on the grounds that he was entitled to an immediate trial in the state court on a three year old Kentucky indictment. Braden establishes that the issue of a speedy trial may be raised on federal habeas corpus even though the petitioner has not been brought to trial on the state charge. The cases differ, however, in that petitioner here requested the court to dismiss the indictment on the grounds that any trial at this juncture will involve a gross denial of due process and Braden sought only an order for an immediate trial.

Judge Owen below thought the difference in the facts controlling, quoting Braden:

> "'He [petitioner] comes to federal court, not in an effort to forestall a state prosecution, but to enforce the commonwealth's obligation to provide him with a state court forum.'" (AA-30)

Petitioner has no quarrel with Judge Owen's formulation of the basic principle, i.e. "that federal habeas corpus does not lie, absent 'special circumstances', to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court" (AA-30), but petitioner further contends that Judge Owen has misread the record before him in concluding that there were no 'special

circumstances' before him in that record entitling petitioner to relief (AA-31). In January 1974, when the state for the first time declared it was ready for trial, petitioner's due process claim had ripened into a due process issue which could no longer be remedied by any trial -- to proceed with trial then would have constituted denial of her right to a speedy trial.

At the time of argument in this proceeding the delay will have extended to six years.

Although the case law is clear that in New York the speedy trial rule is respected, a higher court will not grant such relief until the defendant either pleads guilty[4] or is tried. See People v. Minicone, 28 N.Y.2d 279 (1971); People v. White, 32 N.Y.2d 393 (1973); People v. Wallace, 26 N.Y.2d 371 (1970); People v. Blakley, 34 N.Y.2d 311 (1974); People v. Thomas Johnson, ___N.Y.2d___ (decided December 4, 1975).

Braden, however, establishes the right, under the proper circumstances, of a federal court to grant the writ of habeas corpus and thereafter to fashion the appropriate remedy. Language of the court in Hensley v. Municipal Court, 411 U.S. 345, 350 (1973) is relevant:

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4. In the course of the proceedings, petitioner was offered on numerous occasions a plea of guilty to a reduced felony with a court promise of probation. She continues, however, to protest her innocence and to refuse to plead guilty to a charge of criminal liability in the death of her own child.

". . . we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility and simplicity is clearly evident in our decisions concerning the exhaustion requirement."

II

THE CIRCUMSTANCES OF THIS CASE AS DEMONSTRATED IN THE RECORD BELOW MANDATE ISSUANCE OF THE WRIT AND DISMISSAL OF THE INDICTMENT OF PETITIONER FOR MURDER.

Petitioner is aware of the principle enunciated by Justice Black in Younger:

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts" (401 U.S. at 43)

The record as set forth supra pp. 3 to 7 is an unfortunate revelation of a combination of shocking prosecutorial delay in which the state trial court wittingly or unwittingly cooperated. As early in the proceedings as March 1970, the District Attorney in charge of the case is quoted by the then defense lawyer (now Judge of the Criminal Court), Harold Rothwax, as saying when the petitioner was about to be released on bail:

". . . you got yourself a bail acquittal." (AA-21)

Thereafter it appeared that the court file was lost (A-98) and that defense counsel repeatedly and formally requested

a speedy trial or dismissal of the action. When the case was at last called for trial a mistrial was declared on motion of the prosecution and over objection by the defense because the Assistant District Attorney had been taken ill and the prosecution refused to substitute another Assistant District Attorney (A-293-297).

Thereafter petitioner took the proceeding through the only legal process she believed available to her -- an Article 78 proceeding in the nature of mandamus to test the issue of her constitutional denial of a speedy trial. The proceeding, an original writ brought in the Appellate Division of the Supreme Court of New York County, resulted in a summary denial of relief in that court without opinion (A-6). Thereafter on appeal to the New York Court of Appeals, the judgment below was affirmed on the grounds that the issue of speedy trial could not be tested by the mandamus remedy and accordingly petitioner established she had no remedy to assert her constitutional right prior to trial in the state court.

Other circuits have granted habeas corpus relief on the grounds of a denial of speedy trial. Chauncey v. Second Judicial District Court, 453 F.2d 389 (9 Cir. 1971). There, prior to trial in two unspecified proceedings, Nevada had refused to bar a criminal prosecution on speedy trial grounds. The court ruled that the petitioner was entitled to an evidentiary hearing to determine the merits of his constitutional claim.

Such hearing was denied in the case at bar. In so holding the majority of the Chauncey court expressly distinguished the dissenting opinion which would have ruled against petitioner under Younger v. Harris. Said the majority:

> "This is not a suit for injunction but a habeas corpus proceeding under 28 U.S.C. 2241(c)(3) [footnote 1, p. 390]."

Cf. Theriault v. Lamb, 377 F.Supp. 186 (D.C. Nev. 1974); McDonald v. Faulkner, 378 F.Supp. 573 (E.D. Okla. 1974).[5]

Kane v. State of Virginia, 419 F.2d 1369, 1372 (4 Cir. 1970) establishes that the Fourth Circuit extends the right to habeas corpus to a state prisoner prior to trial who has been denied the right of speedy trial:

> "Although federal habeas corpus relief is not ordinarily available to a state prisoner before trial, the peculiar nature of the right to a speedy trial requires an exception to this rule. The detrimental consequences of delay have been repeatedly catalogued."

Said the Third Circuit recently in United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034, 1036 (3 Cir. 1975):

> "It is not an engaging task for a federal court to intrude upon criminal proceedings of a state court through grants of habeas corpus to persons held in custody by the state. However, where federal constitutional rights are imperiled, there is a federal interest in the case which outweighs our concern -- as considerable as that concern may be -- for comity

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5. Judge Owen expressly stated that he based his decision on the McDonald case (AA-34).

with the states."[6]

The Fourth Circuit recently denied habeas relief on a speedy trial claim in Gilshap v. Godwin, 517 F.2d 52, 53 (4 Cir. 1975) but only because Virginia provided an adequate pre-trial review of the issue which had not been availed of by petitioner.

Petitioner in the case at bar has no effective remedy without the action of federal intervention. The writ of habeas corpus through the centuries has proven an appropriate remedy for just such a case.

CONCLUSION

This Court should order the writ issued and reverse the judgment of the District Court.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Petitioner

Dated: December 15, 1975

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6. Webb involved a double jeopardy issue which the Court distinguished from a speedy trial issue. In United States of America ex rel. Moore v. Court, 515 F.2d 437 (3 Cir. 1975) the Court denied habeas relief apparently on the grounds that there was a state ruling of no actual prejudice. Cf. United States of America ex rel. Russo v. Superior Court, 483 F.2d 7 (2 Cir. 1973) (double jeopardy).

APPENDIX

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS	Judge Owen
03-07-75	1	Filed Petition For Writ of Habeas Corpus.	
03-07-75	2	Filed Affid. & Order Appointing Eleanor Jackson Piel as Atty. for Petitioner..Frankel.	
03-11-75	3	Filed Order to Show Cause for writ of habeas corpus-Ret. 3-14-75.-Owen,J.	
03-11-75	4	Filed petitioner's memorandum of law in support of pet'n for Habeas Corpus.	
03-13-75	5	Filed deft's affdvt in opposition to petitioner's application for a writ of habeas corpus.	
03-17-75	6	Filed Petitioner's motion to amend pet'n for habeas corpus.	
03-18-75	7	Filed Order that pending determination of the order to show cause herein, proceedings in the case of People of the State of NY v. Agnes Scranton Ind. No. 27-70 be STAYED, & a copy of this order be served on Atty. Gen. & District Atty. of NY Cty. & on the Clerk, Supreme Court, NY Cty. Owen J. (mailed copies & notice)	
03-21-75	8	Filed Affidavit by Eleanor Jackson Piel on behalf of petitioner.	
06-09-75	9	Filed Petitioner's reply supplemental memorandum of law.	
11-10-75	10	Filed memo Opinion #43371. I reach the same conclusion as did the Court in McDonald Supra. Petitioner's application is denied and the stay is dissolved. Owen,J. M/N	
11-11-75	11	Filed supplemental mem of law in opposition item as indicated.	
11-14-75	12	Filed petitioner's notice of appeal from order of Judge Owen dated November 6, 1975 denying applicant's petition for writ of habeas corpus. m/n	
11-20-75	13	Filed memo endorsed on Application for a Stay, dated 11-20-75. The within application is granted etc, as indicated. Owen, J.	

DATE	NR.	PROCEEDINGS	Judge Owen
11-20-75	14	Filed Petitioners Application for a stay of the State Court proceedings, pending appeal from the order of This Court Nov 10, 1975, denying the habeas corpus and vacating stay of the State Court proceedings heretofore granted on 3-17-75 to the Court of Appeals, etc, as indicated. M/N	
11-26-75		Filed stipulation substituting copies of original papers to the U.S.C.A.	

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel
AGNES SCRANTON,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

----------X

75 Civ. 1138 (R.O.)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the petitioner Agnes Scranton appeals to the Court of Appeals for the Second Circuit from that certain order of Judge Richard Owen dated November 6, 1975, denying petitioner a writ of habeas corpus.

Dated: New York, N.Y.
November 12, 1975

ELEANOR JACKSON PIEL
Attorney for Petitioner
?C West 44 Street
New York, N.Y. 10036
212 682-8238

To:

Louis J. Lefkowitz
Attorney General
State of New York
2 World Trade Center
New York, N.Y.

PETITION FOR HABEAS CORPUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA ex rel. AGNES SCRANTON,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

----------x

PETITION FOR HABEAS CORPUS

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

Petitioner Agnes Scranton, for her petition for habeas corpus pursuant to 28 U.S.C. §2254 alleges:

1. I am currently on parole awaiting trial on the charge of murder under an indictment entitled State of New York v. Agnes Scranton, Ind. No. 27-70, New York County and accordingly I am under the restraint of such charge and indictment.

2. I am next scheduled to appear in court in Part 36 of the Supreme Court, New York County at 100 Centre Street, New York, New York on March 18, 1975 and may be scheduled to go to trial on Indictment No. 27-70 at that time or before.

3. I claim that I am entitled to habeas corpus relief and the dismissal of the indictment against me because my present parole and restraint is in violation of the Constitution and laws of the United States and a denial of due process to me. I

further allege that the commencement of any trial on Indictment No. 27-70 at this time will in itself be a denial of the proce of law.

4. My child Patricia Polite, 15 months old, died on October 6, 1969. On January 6, 1970, I was indicted for the murder of my child and held without bail until some time in March 1970 when I was released on $10,000.00 bail.

5. I was originally represented by Margaret Taylor and Harold Rothwax. In April 1971, the Court appointed Eleanor Jackson Piel to represent me pursuant to New York County Law 18B because I was and still am an indigent supported by welfare by the Social Service Department of the City of New York.

6. In April of 1972 my attorney renewed an oral motion to dismiss the indictment against me because "of the dilatory procedure of the prosecution in this case including the apparent loss of the court file." This motion was again renewed on May 3, 1972 on the grounds that I was being denied a speedy trial. No ruling was made on this motion brought before Supreme Court Justice John Murtagh on May 8, 1972.

7. On October 10, 1972 my attorney again renewed, in writing, the motion to dismiss the indictment for failure to afford me a speedy trial on the murder charges. On January 3, 1973 Judge Joseph Martinis denied the motion but stated:

> "The...branch of the motion regarding a speedy trial is denied on the basis of the record. However, the District Attorney is directed to expeditiously bring the case to trial."

8. Thereafter the District Attorney of New York County took no action to move the case to trial and on November 15, 1973, my attorney again moved, in writing, to dismiss the indictment for failure to afford the defendant her Constitutional right to a speedy trial. The motion was returnable on November 26, 1973 and the court denied the motion on December 10, 1973.

9. On January 21, 1974, the Assistant District Attorney for New York County, Mrs. Leslie Snyder, announced for the first time since I was indicted that she was ready for trial. My attorney orally renewed the motion to dismiss which was denied by Judge Martinis. No courtroom could be found available and the case was called and adjourned for that reason on January 21, 22 and 23, 1974. On January 23, 1974 my attorney again renewed, in writing, the motion to dismiss the indictment for failure of the State to afford the defendant a speedy trial. The motion was again denied.

10. On January 24, 1974, my attorney became engaged in another criminal trial in the United States District Court for the Eastern District of New York and my case was adjourned until February 25, 1974.

11. On February 26, 1974 the case was sent out to Justice Martin Evans for trial. The case commenced by the swearing in of a venire jury panel on March 4, 1974. Three jurors were sworn in the morning of that day and a hearing on the voluntariness of an alleged confession took place on the afternoon of that day before Justice Evans. At the end of that

day my bail of $10,000.00 was exonerated and I was remanded to prison at Riker's Island. On March 5, 1974, Mrs. Snyder, the Assistant District Attorney, became ill and Mr. John Tully was assigned the case. I remained in jail until March 6, 1974 when Judge Evans paroled me. The case was put over until March 11, 1974.

12. On March 11, 1974, over my attorney's objection, Justice Evans granted a mistrial by reason of the illness of the Assistant District Attorney, Mrs. Leslie Snyder, even though Mr. John Tully was then representing the District Attorney's office in this case.

13. On February 13, 1974, my attorney had filed a petition in the Appellate Division, First Department of the Supreme Court of the State of New York requesting that the District Attorney of New York County and the Judges of the State be enjoined from proceeding on the indictment because my Constitutional right of speedy trial had been denied me. That court denied me any relief in an order without opinion on February 28, 1974.

14. On March 12, 1974, my attorney filed a second petition in the Appellate Division, First Department of the Supreme Court of the State of New York requesting that the District Attorney of New York and the Judges of the State be enjoined from proceeding on the indictment because my Constitutional right not to be put in double jeopardy would be denied to me if my case were to be again called for trial. That court

denied me any relief in an order without opinion on April 11, 1974.

15. My attorney appealed from both orders of the Appellate Division to the Court of Appeals of the State of New York. On June 6, 1974 that court consolidated the two appeals and in February 1975 heard argument on the issues.

16. On February 27, 1975, the Court of Appeals of the State of New York ruled against me in an opinion attached hereto and marked Exhibit A.

17. I have exhausted my state remedies by reason of the ruling of the highest court of the State as shown in Exhibit A. I am nonetheless deprived of my liberty and of due process of law by reason of the pending indictment for murder and the intention of the State of New York which I believe will be carried out to bring me to trial on this five-year old indictment on or before March 18, 1975.

18. Memories have dimmed. Witnesses I might have had have moved away and I myself do not remember as clearly as I might the events of over five years ago. I am and always have considered myself innocent of the charges against me.

19. This application is brought on by order to show cause because I believe the State will now move at any moment and at the latest on March 18, 1975 to move the murder case to trial even though any trial of the issue of murder at this time violates the laws of the United States and the State of New York and the Constitutions of both State and Nation.

20. I have made no previous application for a writ of habeas corpus to this court.

21. WHEREFORE, I pray that a Writ of Habeas Corpus issue to the State of New York commanding the State and its agents to attend a hearing for the determination of why I should not be given my liberty, the indictment against me dismissed and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
March 5, 1975

AGNES SCRANTON

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

AGNES SCRANTON, being duly sworn, deposes and says:

I am the petitioner in the above-entitled case and know the facts to be true of my own knowledge except as to those facts alleged on information and belief and as to those facts, I believe them to be true.

s/ Agnes Scranton
AGNES SCRANTON

Sworn to before me
this 5 day of March 1975.

EXHIBIT A

[Annexed to foregoing Petition]

Opinion of the Court of Appeals of the State of New York

State of New York
Court of Appeals

1 No. 84 74
In the Matter of Agnes Scranton,
Appellant,
vs.
The Supreme Court of the State of New York, et al.,
Respondents.
(and one other proceeding)

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM:

The judgments of the Appellate Division should be affirmed, without costs. A claim of a denial of a speedy trial is not cognizable in an application pursuant to Article 78 of the CPLR for a judgment prohibiting a District Attorney and the Justices of the Supreme Court from proceeding on an indictment (Matter of Watts v. Supreme Court, 28 N Y 2d 714; Matter of Lee v. County Court, 27 N Y 2d 432, 437; Matter of Blake v. Hogan, 25 N Y 2d 747.) While a double jeopardy claim may be raised in a prohibition proceeding (Matter of State of New York v. King, ____ N Y 2d ____, ____ [decided January 17 1975]; Matter of Kraemer v. County Court, 6 N Y 2d 363), this petition should nevertheless be

ıied. The petitioner was not placed in jeopardy despite the fact that three rors had been sworn before a mistrial was declared. (Crim. Pro. Law, § 30[1][b].)

* * * * * * * *

dgments affirmed, without costs, in a memorandum. All concur.

MOTION TO AMEND PETITION FOR HABEAS CORPUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA ex rel.
AGNES SCRANTON,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

----------x

MOTION TO AMEND PETITION FOR HABEAS CORPUS
75 Civ. 1138

SIRS:

PLEASE TAKE NOTICE that the petitioner herein, through her attorney, Eleanor Jackson Piel, moves the above entitled Court to amend her petition heretofore filed to request relief from this Court on the grounds set forth in her petition and in addition for injunctive relief pending decision of this Court pursuant to the provisions of Title 42 U.S.C. § 1983.

YOURS,

Dated:
New York, New York
March 17, 1975

Eleanor Jackson Piel
Attorney for Petitioner

36 West 44 Street
New York, New York 10036
212 682-8288

To:
Louis J. Lefkowitz
Attorney General
2 World Trade Center
New York, New York

ORDER STAYING STATE CRIMINAL PROCEEDINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA ex rel.
AGNES SCRANTON,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

----------x

ORDER STAYING
STATE CRIMINAL
PROCEEDINGS

75 Civ 1138

R. O.

The petitioner through her attorney Eleanor Jackson Piel having come before this Court and the respondent State of New York through its attorney Louis J. Lefkowitz together with Robert M. Morgenthau, District Attorney of New York County, by his deputy Jonathan Lovett, having come before this Court and the Court having considered the Petition for Habeas Corpus and the Memorandum of Law in support of said Petition and having considered the Affidavit in Opposition of Jonathan Lovett to which was attached Brief for Respondent Kuh, and this Court having heard argument on the issues, it is

ORDERED that pending ~~further order of this Court, crim-~~ determination of the order to show cause ~~inal~~ proceedings in the case of People of the State of New York v. Agnes Scranton Ind. No. 27-70 be stayed, it is further

ORDERED that a copy of this order be served on the

Order Staying State Criminal Proceedings

AA-15

Respondent Attorney General and Respondent District Attorney of New York County, and on Clerk Supreme Court New York County

Dated: New York, New York
March 17, 1975

/s/ Richard Owen
U.S.D.J.

E N T E R

SUPPLEMENTAL AFFIDAVIT OF ELEANOR JACKSON PIEL IN SUPPORT OF PETITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA ex rel.
AGNES SCRANTON,

Petitioner,

AFFIDAVIT

-against-

75 Civ. 1138
R.O.

THE STATE OF NEW YORK,

Respondent.

----------x

State of New York)
: ss.:
County of New York)

ELEANOR JACKSON PIEL being duly sworn, deposes and says:

I am the attorney for Agnes Scranton, the petitioner herein.

The answering papers to the order to show cause did not appear to me to address the merits on the issue of "speedy trial" prior to the oral argument on the order to show cause on March 14, 1975 before this Court.

At that argument Jonathan Lovett, appearing on behalf of the District Attorney's office of New York County and the Attorney General for the State of New York, argued that 1) the petitioner should have brought on a state habeas corpus proceeding

before coming to the federal court on an exhaustion of remedies argument and 2) that the merits were not on petitioner's side because inter alia she chose to have "elective" surgery in 1974 when the case was finally noticed for trial. I vigorously opposed the truth of (2) and believe the record sustains me.

When I returned to my office on March 14, 1975, however, I wrote a letter to the Court addressing both of these issues and set forth citations from New York law to the effect that State habeas does not lie if the petitioner is not in custody. In addition, I pointed out a reference in my reply brief in the Court of Appeals to conversations I had had with Mr. Terence O'Reilly the deputy District Attorney in charge of the Scranton case from the time of the indictment until some time late in November or December 1973. The thrust of my reference to my conversations with Mr. O'Reilly was to tell this Court that Mr. O'Reilly had not moved the case for trial because he did not believe he had a strong case, or any case, against the defendant-petitioner and accordingly he did not move at any time to place the case on the calendar. Moreover, I quoted his advice to me to bring on a motion to dismiss the indictment for insufficiency of evidence before the grand jury (rather late in my representation of Mrs. Scranton) and his further statement to me that he had advised the trial judge, Joseph P. Martinis, to dismiss the indictment for the same reasons he had suggested that I bring on the motion. Judge Martinis did not dismiss the indictment and the case remained on the calendar.

In order to further buttress my argument (which I believed reflected the truth of the situation and explained the reason for the long delay in bringing petitioner to trial) I spoke, again to Harold Rothwax, Mrs. Scranton's first lawyer and now a Judge of the Criminal Court of New York County. He advised me that in the early part of his representation and in connection with a bail application he had succeeded in persuading a Judge of the Supreme Court (Justice Carney) to reduce Mrs. Scranton's bail from $50,000.00 which was prohibitive to $10,000.00 which through the generosity of social workers, Mrs. Scranton was able to secure her release. When she was released Mr. O'Reilly told Judge Rothwax that he considered her release a "bail acquittal".

I interpret this to mean that the State's case against Mrs. Scranton was so weak that the case would not be moved for trial because the State did not have a good enough case for conviction. Moreover, as the plea-bargaining system works in the state courts in New York -- so long as a person is in custody, pressure can be brought to bear on that person to plead guilty to some charge (perhaps a lesser charge) in order that the person can secure his or her release from custody. Crowded calendar conditions and delay contribute to this result as well.

The fact that her release on bail removed that pressure meant the State could not (with its weak case) pressure her into a plea of guilty.

Thus I urge again on all the facts in the record and

with the additional considerations raised by my affidavit and the attached affidavits of Judge Rothwax herewith attached, that this Court dismiss the indictment because of the denial of the State of the right of speedy trial to petitioner.

Dated: New York, New York
March 21, 1975

/s/ Eleanor Jackson Piel
ELEANOR JACKSON PIEL
Attorney for Petitioner

Sworn to before me this
21st day of March , 1975

/s/ Patrick M. Wall
Notary Public, State of N.Y.
31-4134950

AFFIDAVIT OF HAROLD ROTHWAX IN SUPPORT OF PETITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA ex rel.
AGNES SCRANTON,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

----------x

State of New York)
: ss.:
County of New York)

HAROLD ROTHWAX, being duly sworn deposes and says:

I represented the petitioner herein, Agnes Scranton, in the criminal proceedings against her until I was appointed a Criminal Court Judge in January, 1971.

On March 19, 1975, Mrs. Piel called me and explained that she had brought on a petition for habeas corpus in the federal court and she further asked me to search my memory concerning any incident in my representation of Mrs. Scranton which would be relevant to the speedy trial issue before this court.

I gave an affirmation to Mrs. Piel in February 1974, in connection with the article 78 proceedings, a copy of which is attached to this affidavit and marked Exhibit A.

My recollection is that Mrs. Scranton was arrested on

or about January 9, 1970 on the indictment for murder returned on January 6, 1970 (Ind. 27/70) Supreme Court, New York County.

I moved before Justice George M. Carney, for bail some time in February 1970. The application for bail was vigorously opposed by the District Attorney's office. My recollection is that both Terence O'Reilly, the Assistant District Attorney who was to be in charge of the case and John Keenan, the head of the Homicide Bureau in the District Attorney's office opposed my motion ~~for reasonable~~ to reduce/HR bail and requested that the judge ~~set~~ retain/HR a bail of $50,000.00 which had been fixed and/HR which would have been prohibitive for her release. I argued that in court proceedings which preceded her indictment, on which she had been paroled, she had always appeared in court and that there was no basis for holding her on such a high bail.

Justice Carney set bail at $10,000.00 which Mrs. Scranton was able to post through the generosity of a number of different social workers attached to the West Side Crises Unit of Jewish Family Service and some time after the argument she was released from custody.

I recall and I have so advised Mrs. Piel, Mrs. Scranton's present attorney, that either at the argument on bail or at the next court appearance following it when Mrs. Scranton was no longer in custody, Mr. O'Reilly turned to me and said in substance

"Well you got yourself a bail acquittal"

Mr. O'Reilly also promised me he would put the case on the calendar on a day certain in late May or June, 1970. On that day (the exact date I do not recall), I appeared in court

with Mrs. Scranton and the case was not on the calendar. Mr. O'Reilly was present and advised me that he had forgotten to calendar the case. Mrs. Scranton's case was then put over until September for calendar call.

At no time while I was representing Mrs. Scranton did Mr. O'Reilly or any other person in the District Attorney's office advise me or the court that the State was ready for trial

Dated: New York, New York
March 20, 1975

/s/Harold Rothwax
HAROLD ROTHWAX

Sworn to before me this
20 day of March, 1975.

ELEANOR JACKSON PIELL
Notary Public, State of New York
No. 31-0[illegible]7600
Qualified in New York County
Commission Expires March 30, 1976

EXHIBIT A

[Annexed to foregoing Affidavit]

Affirmation of Harold Rothwax

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

----------x

THE APPLICATION OF AGNES SCRANTON,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Laws and Rules directed to and against the Supreme Court of the State of New York, Criminal Term, County of New York, the several Judges thereof individually and as Judges of the Said Supreme Court and Richard H. Kuh, District Attorney, County of New York and his Representatives.

----------x

HAROLD ROTHWAX, a lawyer duly admitted to practice in the State of New York duly affirms:

I was the attorney for Agnes Scranton from some time in January, 1970, continuously until I was appointed Judge of the Criminal Court on January 13, 1971. Mrs. Scranton had been indicted for the murder of her 15 month old child, Patricia Polite, on January 6, 1970.

During the period I represented her, the case was handled for the office of the District Attorney of New York County by Terence O'Reilly and the case was on the calendar on several occasions.

At no time did I advise Mr. O'Reilly, or anyone in the District Attorney's office that Mrs. Scranton was too ill to go to trial; nor in fact was Mrs. Scranton, a sufferer from congenital sickle-cell anemia, too ill to be tried.

To the best of my recollection, the District Attorney did not advise either me, my client or the court that he was ready for trial during the one year period.

I asked Mrs. Eleanor Jackson Piel to handle the case thereafter, turned my file over to her and understand that she has represented Mrs. Scranton from that time until the present.

Harold Rothwax

HAROLD ROTHWAX

OPINION OF JUDGE OWEN DENYING WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. AGNES SCRANTON, Petitioner, -against- THE STATE OF NEW YORK, Respondent.	75 Civ. 1138 MEMORANDUM AND ORDER

OWEN, District Judge.

Petitioner Agnes Scranton, charged with murder of her infant child, has filed a habeas corpus petition seeking dismissal of the New York State criminal indictment on the grounds that she has been denied her right to a speedy trial.* Her petition poses two threshhold jurisdictional questions. First, whether, being at liberty on pretrial parole, she satisfies the "custody" requirement for a habeas petition,** and second, whether with her

*Petitioner also claimed that a trial on the indictment would constitute double jeopardy. However, in oral argument, petitioner's counsel conceded that this contention lacked merit.

**28 U.S.C. §2241(c)(3).

state trial pending, she must present her claim at such a trial before she is deemed to have exhausted her state remedies, a condition precedent to her application for relief in Federal Court.

Petitioner Scranton was indicted in January of 1970. The case was called for trial in March, 1974.* The trial, however, was ill-fated, due to illness and injury. Shortly before its outset, petitioner injured her hip and her counsel fractured her knee, and after three jurors had been selected, the prosecutor became ill and was unable to continue. The judge then declared a mistrial.

Petitioner moved the Appellate Division and then the Court of Appeals for a judgment pursuant to Article 78 prohibiting prosecution on speedy trial and double jeopardy grounds. The Court of Appeals ruled that the speedy trial claim was not cognizable in an Article 78 application, and

*The responsibility for this lengthy delay between indictment and trial is vigorously disputed by the parties. Prior to trial, petitioner's counsel brought five unsuccessful motions for dismissal on speedy trial grounds, and claims, in substance, that the state procrastinated because of the weakness of its case. The state insists that any reluctance it may have shown to prosecute was occasioned by statements of petitioner's counsel that petitioner only had a very limited life expectancy because she was suffering from sickle-cell anemia. Neither party has attempted to enumerate the individual causes of the more than fifty adjournments that have occurred in this case.

that the double jeopardy argument had no merit.* Petitioner then applied to this Court for "habeas corpus relief and the dismissal of the indictment." ** Pending determination of this petition, I ordered that state proceedings be stayed.

The state argues that this Court lacks jurisdiction because petitioner is not "in custody" within the meaning of the habeas statutes. In March of 1970, petitioner was released on $10,000 bail. She was free on bail until March of 1974 when she was briefly remanded in order to facilitate her transportation to trial. She was then released on parole.*** As a practical matter, this "parole" is the equivalent of bail. Petitioner's only apparent obligation is to appear at trial when directed by the Court,

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*36 N.Y.2d 704 (1975).

**Petitioner seeks habeas corpus pursuant to 28 U.S.C. §2254. That statute is not applicable because petitioner is not in custody "pursuant to the judgment of a state court" (emphasis added) 28 U.S.C. §2254(a). Consequently, I shall treat this petition as an application under the more general habeas statute, 28 U.S.C. 2241, which encompasses situations where the petitioner has not been convicted.

***Once bail is exonerated in New York State, it is not simple to reset it. The entire bail-setting and posting process must be repeated. To avoid this cumbersome procedure, the trial judge released petitioner on "parole".

and to be "amenable to the orders and processes of the Court." New York Criminal Procedure Law §510.40(2) (McKinney's, 1975). Since March of 1974, petitioner has been on this "parole" status.

There have been conflicting decisions on whether a person released on bail is "in custody" for the purposes of a habeas petition.* In 1973, the Supreme Court in the case of Hensley v. Municipal Court, 411 U.S. 345, held that a person released on his own recognizance pending appeal, following his conviction at trial, is "in custody". While in this Circuit the specific question remains open,** other Circuits*** have concluded that the Hensley rule should extend

*Contrast Matysek v. United States, 339 F.2d 389 (9th Cir. 1964) with Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968).

**I note that the Second Circuit has declared that a restraint can be sufficient to constitute custody even if it will not take effect until after some future date. United States ex rel. Meadows v. New York, 426 F.2d 1176, 1179 (1970), cert. denied, 401 U.S. 941 (1971) (parole detainer).

***United States ex rel. Russo v. Superior Court, 483 F.2d 7,12 (3rd Cir.), cert. denied, 414 U.S. 1023 (1973); Anglin v. Johnston, 504 F.2d 1165,1168 (7th Cir. 1974), cert. denied, 95 S. Ct. 1353 (1975); United States ex rel. Bailey v. United States Commanding Officer, 496 F.2d 324,326 (1st Cir. 1974).

to cases where the defendant is on parole prior to trial.

One of the bases for the Hensley decision--that the petitioner is subject to restraints "not shared by the public generally" Id. at 351 quoting Jones v. Cunningham, 371 U.S. 236,240 (1963)--applies equally to the pretrial situation. Scranton is in a position similar to that of Hensley who "cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice." Id.

I conclude from the foregoing that petitioner has met the"custody" requirements of 28 U.S.C. §2241.

Although 28 U.S.C. §2241 does not specifically require the exhaustion of state court remedies, the exhaustion requirement is part of the common law heritage which applies to all habeas statutes. There is no question that petitioner here has exhausted her state remedies prior to trial.* The issue which remains, however, is whether petitioner must present her denial of a speedy trial claim

*Petitioner's counsel moved for the dismissal of the indictment on five occasions, and brought an Article 78 motion to prohibit further prosecution. It is conceded by the State that a habeas corpus petition would not be entertained by the state courts because petitioner is not incarcerated. See e.g. People ex rel. Romano v. Warden, 28 N.Y.2d 928 (1971).

at her state trial and upon appeal if convicted before coming to this court for collateral relief.

Both parties rely upon Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973). In Braden the Court held that a Federal Court had jurisdiction to entertain a habeas petition which raised a speedy trial claim prior to the state court trial. But Braden is fundamentally different from this case. In Braden, the state refused to prosecute, and the only relief sought was an order directing immediate trial. The Court noted at p. 491:

> Petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court, not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum.

In contrast, here petitioner Scranton has been given a court date which she has had stayed.* Further, Braden specifically enunciates the basic principle that "federal habeas corpus does not lie, absent 'special circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." 410 U.S. at 489.

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*There is no claim that the state will not immediately proceed to trial if this petition is denied.

Petitioner's counsel has not advanced any "special circumstances" which would make it appropriate to adjudicate her speedy trial claim prior to trial. If the pretrial delay infects the fairness of the trial, the Court can dismiss.

Under state law, petitioner's speedy trial claim could be raised at trial and upon appeal. See e.g. Watts v. Supreme Court, 28 N.Y.2d 714 (1971). And at trial, the Court would be in a better position to determine whether petitioner had been prejudiced by the delay.* At this pre-trial state, there are only vague allegations about prejudice.**

Scranton's demand that pending state criminal proceedings be enjoined raises problems of federal-state comity not involved in Braden. In Younger v. Harris, 401 U.S. 37 (1971), the Court emphasized that because of "Our Federalism" federal courts should not enjoin pending state criminal proceedings unless there is a threat of irreparable injury which is "'both great and immediate'". 401 U.S. at 46, quoting Fenner v. Boykin, 271 U.S. 240,243 (1926).

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*Under Barker v. Wingo, 407 U.S. 514 (1972), the extent of prejudice is one of the factors to be considered in deciding a speedy trial claim.

**"Memories have dimmed. Witnesses I might have had have moved away and I myself do not remember as clearly as I might the events of over five years ago." (Petition ¶18).

And the Court stated:

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. Id.

Petitioner has alleged, in conclusory terms, the threat of "irreparable injury." But the Court in Younger held that "even irreparable injury is insufficient unless it is 'both great and immediate.' " Id. And petitioner fails to indicate how the injury here would be more severe than the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." She makes an allegation of "bad faith" on the part of the state but has not supported it with substantial evidence.

Although Younger did not involve a habeas application, the Court noted in Schlesinger v. Councilman, 420 U.S. 738 (1975), that the considerations of comity inherent in Younger are precisely those that also underlie the exhaustion requirement for habeas petitions 420 U.S. at 756. The continuing vitality of these considerations is indicated by the Court's opinion in Huffman v. Pursue Ltd., 420 U.S. 592 (1975), which vacated a federal injunction against pending state nuisance proceedings on the Younger theory. See also United

States v. Bell, Slip Op. 123,136 ____F.2d____ (2d Cir., Oct. 6, 1975). At the very least, therefore, the line of cases following Younger indicate that the exhaustion requirement applies strictly to habeas petitions seeking to enjoin pending state proceedings.*

There is some apparent support for petitioner's position in certain recent opinions which appear to enjoin state proceedings on speedy trial grounds. But in general these involve persons already incarcerated on other charges, where the state refuses either to prosecute or to dismiss the indictment. Under Braden, these are appropriate cases for habeas relief, and the courts have usually given state authorities the option of immediately commencing prosecution or dismissing charges. E.g. Beck v. United States, 442 F.2d 1037 (5th Cir., 1971); May v. Georgia, 409 F.2d 203 (5th Cir. 1969). By giving state authorities this option, these decisions implicitly reject petitioner's position that the speedy trial issue should be decided before trial in federal court.

In Chauncey v. Second Judicial District Court, 453 F.2d 389 (9th Cir. 1971), the court, in a 2-1 decision, held that the district court did have jurisdiction to enjoin

*See the discussion of the relationship between habeas petitions and the Younger rule in Theriault v. Lamb, 377 F.Supp. 186 (D. Nev. 1974).

a pending state criminal proceeding if the petitioner had been denied his right to a speedy trial. But there the state courts had already rejected petitioner's claim on the merits. The Court stated, "(i)t would surely be an exercise in futility to require [petitioner] again to assert his claim in the Nevada courts." 453 F.2d at 390, n.1. In this case, petitioner's Article 78 application was denied by the Court of Appeals of New York on purely procedural grounds. Since the New York Courts have taken no position on the merits, there is no reason to conclude that a post-conviction appeal would be futile.

In McDonald v. Faulkner, 378 F.Supp. 573 (E.D. Okla. 1974), the Court, in a similar situation, concluded that the petitioner must first litigate his speedy trial claim at trial and upon appeal if need be before seeking collateral relief from a federal court.

I reach the same conclusion as did the Court in McDonald, supra. Interests of comity demand that petitioner exhaust her state remedies. She may present her claim as an affirmative defense at trial, and upon appeal if convicted. Petitioner's application therefore is denied and the stay is dissolved.

If the state does not prosecute promptly, petitioner shall have leave to apply again to this court for relief.

SO ORDERED:

United States District Judge

November 6, 1975.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket ~~Index~~ No. 75-2145

UNITED STATES OF AMERICA ex rel.
AGNES SCRANTON,
Petitioner-Appellant
~~Plaintiff~~

against

THE STATE OF NEW YORK
Respondent-Appellee
~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th St. New York, N. Y. 10024

That on December 15 *19* 75 *deponent served the annexed*
Brief and Appendix for Petitioner-Appellant
on Hon. Louis J. Lefkowitz, Attorney General, State of New York
attorney(s) for Respondent-Appellee
in this action at Two World Trade Center, New York, N.Y. two ies
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

December 15, 1975

GEORGE COHEN
Notary Public, State of New
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977

August De Fonse

The name signed must be printed beneath
August De Fonse